

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
SOUTHERN DIVISION

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UNITED HEALTHCARE OF :  
FLORIDA, INC., et al, :  
Plaintiffs, : Civil No.: 17-01787-TDC  
:  
v. :  
:  
AMERICAN RENAL ASSOCIATES :  
HOLDINGS, INC., et al, :  
Defendants. : August 23, 2017  
:  
- - - - - - - - - - - - - - - x Greenbelt, Maryland

**TELEPHONE CONFERENCE**

BEFORE: THE HONORABLE CHARLES B. DAY, Judge

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P R O C E E D I N G S

(Whereupon, at 10:40 a.m., the telephone conference begins.)

THE COURT: -- I think you started a little sooner than I hoped. So let's -- this is a telephone conference involving United Healthcare versus American Renal, case number 17-1787. This is a pre-discovery motion filing telephone conference call which I am inclined to give some direction to counsel and at least express maybe some leanings on potential discovery problems and hopefully that can keep the potential motions to be filed to a minimum. But with that said, now if I can ask counsel to identify themselves for the record.

MS. LOCKNER: Thank you, Your Honor, this is Anne Lockner from Robins, Kaplan in Minneapolis along with my colleague Will Barnstein. I will be representing United Healthcare of Florida and All Savers Insurance Company.

THE COURT: Thank you.

MR. PARK: Good afternoon, Chong Park of Ropes and Gray, on behalf of American Kidney Fund.

THE COURT: Thank you.

MR. BUSHOFSKY: Your Honor, Jeff Bushofsky and Tim Farrell in the Chicago office of Ropes and Gray also representing the American Kidney Fund.

THE COURT: Thank you all. I trust that we are at a better place. A lot less vacationing in front of us. Travel

1 around the world as I recall some folks were doing. But we do  
2 have a limited to plow through a few of the things. I have  
3 received and reviewed your submissions and I thank you for  
4 them. Chances are in the future, your submissions will be  
5 shall I say a bit more streamlined. And since that typically  
6 we have a page limitation on the educational materials.

7 Well with that being said, it is my vision at this  
8 point to kind of alternate between counsel. That is giving  
9 each of you an opportunity to take on one subject and we will  
10 talk through that subject before someone gets to choose  
11 another one. So with that being said, I will start with  
12 United Healthcare. And know that you have a number of  
13 categories and subcategories of concern but you get to choose  
14 one and we will fully explore that one.

15 MS. LOCKNER: Thank you, Your Honor. You know the  
16 first one that may make sense to discuss is the time period.  
17 It is our position that the time period should be the same as  
18 the time period in the Florida case.

19 THE COURT: Let me interrupt you. I agree. I  
20 probably should go back to the bull in the ring and see if  
21 anyone from the Foundation -- either Mr. Park or Mr. Farrell  
22 or Bushofsky has something more meaningful to tell me then  
23 what has been lifted from the Florida litigation order, which  
24 I read as going back to 2014. I understand that you want it  
25 to be 2016 for some good reasons but I am of the strong belief

1       that often times there needs to be a bit of a lead up to  
2 obtaining information as opposed to the date of supposed  
3 infraction.

4                  Here, I understand that 2016 is really the date in  
5 place of some of these people who are allegedly involved in  
6 this manifest set forth in the second amended complaint. But  
7 even if that were true, I would personally give him more than  
8 2016 but looks like Florida court has said you can go back to  
9 2014. So with that lay of the land, I will hear you on that.

10                 MR. BUSHOFSKY: Your Honor, it is Jeff Bushofsky  
11 for the American Kidney Fund. First of all let me say as is  
12 obvious but I want to accentuate it. We are not a party. We  
13 didn't sue anyone and we weren't sued by anyone. And so under  
14 the rules, I think that it is fair to come out with a  
15 presumption that is sort of a penungle(sic) timing of requests  
16 that might be appropriate for a party, not necessarily true  
17 for a non-party. That is one point.

18                 Another point is that, as I understand it, the  
19 October 2014 start date for the discovery in the Florida  
20 litigation was the result of a compromise between the parties  
21 in that case. My client had no input into that discussion.  
22 Presumably Ms. Lockner's client was looking for materials  
23 going back quite a bit father and I assume that ARA was hoping  
24 to give documents for a shorter time period more recently but  
25 I wasn't involved with that nor would that have been

lnc 1 appropriate.

2 I don't know how that --- was made but we maintained  
3 that October 2014 which Ms. Lockner will correct me if I am  
4 wrong, I think it is actually the starting date, not 2014  
5 which I think we would just assume that that was January 1 or  
6 something like that. I think an ordinary case. We are not  
7 sure where that came from at the end of the day.

8 But here is what our position is at AKF. The  
9 alleged fraud involves particular United Healthcare plans and  
10 policies on the Obamacare exchanges for the 2016 policy year  
11 as I understand it. And therefore that is what is relevant.  
12 This is not just a case about a vague(sic) conspiracy between  
13 supposedly dialysis providers and this 50 year old charity  
14 that has been helping people long before Obamacare was even  
15 you know a gleam in the former President's eyes.

16 It is about particular plans for particular year.  
17 And so we could get inappropriate and unduly burdensome to  
18 make this charity go back to 2014 to look for things simply  
19 because United Healthcare thinks that there might be something  
20 out there and there is speculation that there might be  
21 something that is relevant and you know, responsive.

22 THE COURT: Well, I tend to still lean towards  
23 United's view on this and I agree with you that we may not  
24 know how the sausage was made but I do believe that the  
25 Florida court in some way put its signature on the end result

1 being 2014 and I agree with you that it may be October of 2014  
2 and not January and we do need to clarify that point.

3                 But I also think that as I understand the  
4 allegations involved, it is not as if one can rely or believe  
5 or assume that any of the alleged conspiratorial acts that is  
6 the request for a certain contributions or the receipt of  
7 certain contributions and then the outpouring to different  
8 patients who then can be reimbursed through United's plan in  
9 the 2016 year.

10               I don't think 2016 discovery is going to capture all  
11 of that in my small mind. So again it is just my leaning but  
12 that is the hill you are working with.

13               MR. BUSHOFSKY: Your Honor, in the spirit of  
14 compromise -- first of all, we don't think we should produce  
15 most of this stuff, we are just talking about dates right now.  
16 I will make a representation to the Court that the beginning  
17 of the open enrollment period for the policy years that are  
18 actually at issue in the case in Florida was October of 2015.

19               My client would consider that as an appropriate  
20 starting date because if there was shenanigans that were  
21 supposedly happening relevant to the 2016 plan year, then I  
22 will concede for purposes of this compromised discussion that  
23 there might be something potentially relevant assuming that  
24 there is anything relevant -- we will hypothesize that there  
25 is, that it could exist in 2015.

1                    Making this charity go back to 2014 starting at a  
2 time which would be the open enrollment period for the 2015  
3 plan year is -- I don't know how that resulted or why that the  
4 Court had entered an order with that compromise position, but  
5 it is unduly burdensome and it is not calculated I think ---  
6 refined -- the potential evidence is actually relevant to the  
7 claims in the case. The allegations.

8                    But 2015 material might.

9                    THE COURT: Well said and I still have my leanings  
10 but I can certainly be moved further but chances are you will  
11 need some either different arguments or find another way to  
12 get my up on a different side of the bed in the morning then I  
13 have to rule upon any of this.

14                    But I do want to also express my -- some clarity and  
15 I guess that we will have to bounce back to Ms. Lockner, is  
16 there an agreement that the Florida court was really speaking  
17 about in October 2014 period?

18                    MS. LOCKNER: It wasn't according to an agreement.  
19 He settled I think on I think splitting the babies(sic) if I  
20 recall correctly and I just want to refer to the transcript.  
21 But if I can speak a little bit to the 2015 2016 issue.

22                    THE COURT: Before you take me there, let me  
23 interrupt, before you take me there, I wasn't sure what was  
24 meant by the timeline. Are we really talking about January 1,  
25 2014 or are we talking about October 1, 2014?

1 MS. LOCKNER: Oh I am sorry, Your Honor. No we  
2 didn't specify to have a subpoena October 1, 2014 to the  
3 present.

4 THE COURT: Okay, thank you. So take me where else  
5 you want to.

6 MS. LOCKNER: Okay. So I just wanted to point out  
7 that AKF spends a lot of time focusing on the allegations in  
8 our complaint, understandably but the first line of our  
9 complaint in paragraph one says "Since at least the beginning  
10 of 2016 and likely years earlier" and goes on. Our attachment  
11 A or Exhibit A to our complaint did have specific claims  
12 relating to 2016 -- this was really our obligation under Rule  
13 9(b) to seek --- with specificity. We did that but the Rule  
14 90 threshold is to not constitute the whole scope of a  
15 complaint.

16 And in fact, the discovery since the time from ARA  
17 has made clear that this scene did in fact go beyond just the  
18 30 people that we have been able to identify. Again this is a  
19 fraud case and we don't have all of the information and it did  
20 in fact go back to the 2015 plan year. So for that reason, I  
21 tend to agree with Your Honor that I do think there is the  
22 need to go back to the October 1, 2014 open enrollment because  
23 we know that the dispute was going on both in 2015 and in  
24 2016.

25 THE COURT: Okay well hopefully that will shape

1 maybe future discussions that you all may have on the subject  
2 and you can find a way to compromise as opposed to ramping up  
3 the litigation engines. But be that as it may, let me swing  
4 over to the Fund and give your knowledge to pick one of these  
5 issues and we can talk about it.

6 MR. BUSHOFSKY: Sure. Before I give up on the date  
7 issue and what period is at issue, I mean, I think  
8 Ms. Lockner's statemtn you know, I don't think she is making  
9 misrepresentations obviously but the things that she was  
10 talking about sort of vague references to evidence that she  
11 got from someone else that shows that this report scheme or  
12 conspiracy extended into the 2015 plan year. As I understand  
13 it, that is not actually in the complaint. And the complaint  
14 as it stands has not even left passed muster under either Rule  
15 9(b) or 12(b) (6).

16 And so the idea that what other courts have called a  
17 fishing expedition should apply to my charity clients so that  
18 they can go back three years or four years instead of one year  
19 or two years which will increase the the burden on them by 100  
20 percent or 200 percent. Because they will simply be looking  
21 at more documents, four more years. There is not something  
22 that I can agree with. And it doesn't make any sense to me.

23 I understand Your Honor's inclination and I am sure  
24 that the Judge in Florida was --- in ordering what the  
25 discovery should be. But I don't think that that necessarily

1       should apply to a stranger to the litigation who is a third  
2       party with limited resources. And so if there is a particular  
3       other issue that Your Honor would like for me to address  
4       next, I am happy to do that.

5                     THE COURT: Well, I didn't have an order. I  
6       reviewed your submission. But I felt like you would be  
7       probably be inclined to talk about those things that are most  
8       dear to your side of the equation. I mean, I can cherry pick  
9       and find something but --

10          MR. BUSHOFSKY: No, Your Honor. I didn't mean to  
11       put the burden on the Court, I am sorry about that. I am  
12       happy to address what is near and dear to our heart next. I  
13       think that a 30,000 --- level, one of the things that is most  
14       concerning to me and it covers a variety of the demand, both  
15       in the formal -- in the follow up letters is the concept that  
16       my client should be providing to this giant health care  
17       company that is one of the 5 or 6 biggest profit making  
18       companies in the United States and easily the largest private  
19       health care insurer, information about patients who are both  
20       by definition because they are being helped by the American  
21       Kidney Fund and or disabled who apparently according to  
22       United, they want the information regardless of whether these  
23       particular patients are insured by United or are patients of  
24       United's adversary in the litigation, ARA.

25                     THE COURT: Let me interrupt you. Let me swing over

1 to Ms. Lockner because I do have some concerns there. As I  
2 understand it, again the Court in Florida has spoken to this  
3 issue. It seems as though you are not getting one, anything  
4 beyond the core Affordable Care Act kind of policies that  
5 United says is in play. And I get the impression that that  
6 core is basically saying you are not going beyond the universe  
7 set forth in the claims in the second amended complaint and  
8 therefore this case seems somewhat limited. I will give you  
9 the floor.

10 MS. LOCKNER: Thank you, Your Honor. So --- the --  
11 I want to first address the order that the --- is relying upon  
12 a lot for that argument. That order dealt with a very narrow  
13 set of requests that we had sent to ARA. Let me back up we  
14 have been getting all kinds of information about ACA plans or  
15 cases on ACA plans but beyond that we also got another sort of  
16 specific case information.

17 We knew of 30 patients when we plead the complaint.  
18 We learned of 24 more ACA patients after -- through discovery  
19 from ARA. And but in addition to that, we have had a much  
20 broader scope of things that has not been limited to just the  
21 insurance plans in play or are named. And in general  
22 discussions about --- practices, the AKF, that kind of thing  
23 has been generally allowed. It is when we get into specific  
24 questions of names of specific individuals and that is what  
25 was at issue in the order that the Court was addressing.

1                   We had gone back and said we would like to see --  
2 because it looks like from documents that we had, that the  
3 seam(sic) did extend beyond the ACA plan. We went back to the  
4 Court and said can we get -- can we have them identify who  
5 those people are who are getting a --- funding beyond ACA  
6 plans? And on that point he said no.

7                   So we -- I want to be clear, I am not speaking  
8 identities or names or micro level information about non-ARA  
9 non-United case. That did then however -- the theme that we  
10 have plead generally deals with this fair play -- this honor  
11 system which means that in the aggregate what is happening is  
12 from what we can tell is that ARA makes monthly sometimes more  
13 than once a month payments to the AKF and it is our belief and  
14 there is a lot that we have that suggests that then means that  
15 the AKF is funding a comparable amount back to ARA's cases.

16                  And even Mr. Bushofsky in our last meet and confer,  
17 we talked about this that the AKF does not slice and dice this  
18 based on what kind of plan the members are on. They just see  
19 the number that goes out, there is a number that comes in. So  
20 when we are talking about some of the financial measures  
21 perhaps or just the theme in general, when it is like a higher  
22 level more generic discussion, not necessarily by individual  
23 patients, in that aspect, Your Honor, there is -- because we  
24 are not going to be able to show that the amount AKF pays to  
25 the AKF was essentially quid pro quo in the amount in the

1 aggregate that was paid back because it wasn't done on an  
2 individual basis. So the payments by the ARA was done in  
3 aggregate basis.

4 THE COURT: I get your point and I interject only in  
5 the sense that I want you to understand the canvas that you  
6 are trying to write on in terms of my impressions and how to  
7 move me around. And quite frankly, after reading your  
8 submission, I understood how it could be difficult for United  
9 to pursue its action if there is this is kind of a -- in your  
10 words, a kind of a global check going from the fund for all  
11 contributions that may relate to ARA and back and forth in  
12 that regard without articulating or specifying which patients,  
13 which people may be involved for what amount of much smaller  
14 contributions or ---.

15 But when I look at the Court's response to that  
16 interrogatory number 17, I don't see any ambiguity there in  
17 terms of the Court's ruling. I understand from what you are  
18 telling me that you were trying to pursue more particularized  
19 information which you are now seeking at this time but I --  
20 maybe you need to guide me through this a little bit better in  
21 terms of the reading that I did.

22 MS. LOCKNER: Yes and I understand that, Your Honor,  
23 that order, I can order for somebody who hasn't been living  
24 and breathing this case. So it would certainly give us I  
25 think a different impression than perhaps what it does to

1 those ---. I want to back up because when we move -- we move  
2 to compel against ARA back in January. And we got really  
3 everything we wanted with respect to the AKF. It was not  
4 limited to just AKF -- from ARA. It was not limited to just  
5 AKF related materials having to do with the ACA.

6 So we had a broader deal that we were working on and  
7 that we had gotten -- we were told that we got stuff from ARA  
8 that was certainly far broader than just like I said, AKF  
9 related to the ACA. We were interested in going back and that  
10 order that you are referring to was precisely about two  
11 requests that we were dealing with very specific -- and that  
12 was dealing with individually made people.

13 We wanted to know how many people were receiving AKF  
14 funding at ARA that were United members. And that is where  
15 the Judge said no I am going to cut you off, you are going to  
16 be limited to the ACA when it comes to the individual names of  
17 people. And that is -- we can provide you with the briefing  
18 that would show that that was about and I can provide you with  
19 the transcripts of the ruling from back in the  
20 January/February time period where it is clear that we had  
21 broader -- we were granted broader discovery.

22 More generally it really when we just -- when we had  
23 gotten to the point where we were asking for individual names  
24 and identity of patients that the Court said no. And that is  
25 when I am more than willing to abide by that. And in fact my

1 very first letter to Mr. Bushofsky, that motion had been  
2 pending and I said we would live by the parameters of what was  
3 decided there. And I will when it comes to individual names  
4 and people and individual payments.

5 But we need to understand in the aggregate how that  
6 process works, how the expectations were ARA by the AKF.  
7 Those more general higher level kinds of documents and  
8 information. That we think is what clearly allowed by the  
9 Florida court with respect to ARA and is necessary for us to  
10 get what we need. And like I said, ARA in many ways did  
11 distinguish between and they tracked things different based on  
12 whether someone was on an ACA plan or whether it was on a ---  
13 plan, whether it was on COBRA, they did track it differently.

14 My understanding is from Mr. Bushofsky is that the  
15 AKF has not -- they don't particularly -- they are not ---  
16 really what the plan is so I don't think it would even be  
17 really possible for them to delineate and price this the way  
18 that they suggests that they can. But to be clear, I am not  
19 asking for individually named people who are not ARA members,  
20 United members for ACA ---.

21 THE COURT: Well, I certainly can't resolve the  
22 issue today. I do still enjoy some confusion about what in  
23 space may seem to be a reasonable request to try to understand  
24 how the monies may flow back and forth by getting the  
25 information from the AKF and then ARA if possible, but this

1 limitation that seems like the limitation that is set forth  
2 there in the Court's order of July 10, 2017, stands true then  
3 I don't see how you can get from the backdoor what you  
4 couldn't get through the front door.

5 And as I understand it, this paid for play concept  
6 would basically be more of a --- discovery production and  
7 response more so than those limitations might allow. So I  
8 can't resolve it but I hope that both sides understand my  
9 confusion and dilemma in the event that this thing will move  
10 forward with any kind of briefing.

11 So I guess I will go back to the United with another  
12 topic that you can pick.

13 MR. BUSHOFSKY: Your Honor, may I address Ms.  
14 Lockner's comments about what the court in Florida supposedly  
15 meant in contrast in which is written down on His Honor's  
16 order?

17 THE COURT: Go right ahead.

18 MR. BUSHOFSKY: All right, so first of all, Your  
19 Honor wasn't there and I wasn't there. Ms. Lockner was and  
20 then ARA was as was the judge. So I understand her perception  
21 of what was happening but all we have to look at is a  
22 transcript and the order. The order is very clear as Your  
23 Honor has said. Just a second -- and Your Honor, Mr. Farrell  
24 was just directing my attention to a January transcript which  
25 we can provide to Your Honor or you might already have where

1       the Court addressed the overbreath issue and I think that the  
2 comments from the judge are very much in line with the words  
3 on the paper in his later order.

4                 It says that his concern, "The concern I have is  
5 that I think this case because it is so large, the discovery  
6 sought is so large, if you go beyond the allegations of the  
7 actual complaint, because I do believe that a complaint is  
8 more specific, I think the complaint refers to these  
9 plaintiffs, two defendants and it really does seem to involve  
10 a scheme to kick people off or induce people to stay off  
11 Medicare and Medicaid and get them to a ACA plan. That seems  
12 to be the way I read the complaint. For example" and then the  
13 Court goes on to read from the complaint.

14                 And then finally I guess the punch line is, the  
15 judge says, "So certainly the plaintiffs are entitled to  
16 discovery dealing with whether ARA personnel at ARA's  
17 direction worked to convince dozens of patients in Florida and  
18 Ohio to abandon or forego Medicaid coverage and enroll in  
19 commercial plans offered by United through the ACA."

20                 And so now today Ms. Lockner as she did in this  
21 motion, was addressed by the Court's order, more recently is  
22 seeking information regarding all sorts of different things  
23 and different people that don't have anything to do with ARA,  
24 Obamacare plans in Florida and I am sorry, United Obamacare  
25 plans in Florida and Ohio, but also all sorts of other plans

1 including COBRA, Medigap and employer plans.

2 And just for some contacts, Your Honor, because  
3 there has been a lot of narrative about this reported scheme  
4 and how my client which is a 50 year old charity and has the  
5 highest charity ratings available by the neutral sites and  
6 organizations that rate charities, that it is really just a  
7 tool of some big core profit dialysis providers. And the  
8 allegations in the complaint are just the tool for the  
9 providers to help make money off of Obamacare.

10 And the allegation now is that no it is actually  
11 much bigger than that. It involves COBRA and things like  
12 that. Well, Your Honor, the context is this. Upon passage of  
13 the ATA(sic), insurance companies can't discriminate based on  
14 prior existing conditions. Inside the plan or outside the  
15 plan, in my view of the world and I litigate it that forced  
16 insurance companies to take the Ryan White funds for people  
17 living with HIV and Aids when the insurance companies were  
18 rejecting those payments, even though it is a Government  
19 charity on precisely the exactly same allegation as we are  
20 here today levied at my client, AKF.

21 So they don't want sick, poor people on their  
22 private plan because they are expensive to take care of. And  
23 they have to take the same premiums as someone who is healthy.  
24 And so our big concerns and one of the concerns that we kept  
25 trying to bring to Your Honor's attention in our papers is

1 there is a real danger of a fishing expedition here that is  
2 inconsistent with what the Florida court ruled and certainly  
3 what the Denver court in the other subpoenaed case ruled.

4 Our big concern is that this little old case  
5 involving somewhere between a couple of dozen which is in the  
6 complaint and maybe a couple of dozen 24 more than Ms. Lockner  
7 said she has discovered through the discovery that she got  
8 from ARA is really just like a DOHA investigation that a bunch  
9 of private lawyers at Robins Kaplan are conducting and they  
10 are going to look for the next case on behalf of their  
11 insurance clients and that is not appropriate use of  
12 discovery.

13 And I guess more as a point for my client, it gets  
14 real expensive real fast for a charity in AKF's position. The  
15 case is about particular United Healthcare plans in Florida  
16 and Ohio for a very limited period of time under an allegation  
17 that people were being moved to Obamacare policies because  
18 they get a lot more reimbursement -- the providers get more  
19 reimbursement under that type of policy than under a  
20 Government program.

21 So we agree with what the Court says in Florida on  
22 this issue. I think it is very clear and I can't see anything  
23 in the transcript that suggests otherwise. I am happy to  
24 address the next issue, Your Honor.

25 THE COURT: Well, before you go there, let me add a

1 little two cents here and that is as I read this order from  
2 July 10, 2017, I would agree with you that Medigap and COBRA  
3 and employer sponsored group plans are not in play. I think  
4 the numbers --- about whether it is the 30 or the 54 and since  
5 we are talking to some degree about who is in and who is out,  
6 it seems like this thing is more from what was set forth in  
7 the second amended complaint and the attachments thereto, so I  
8 guess I should give Ms. Lockner the last opportunity to speak  
9 to the numbers that are in play to the extent that there is  
10 some dispute there.

11 MS. LOCKNER: The number that we know of Your Honor  
12 is 54 at this point. Like I said 30 of them were the ones  
13 that we knew of when we filed the complaint that we had been  
14 able to discovery on our own. And then there were 24 more  
15 that ARA had identified during the course of discovery --

16 THE COURT: You are telling me that ARA disclosed  
17 these additional people to you?

18 MS. LOCKNER: Exactly.

19 THE COURT: Okay let me ask the Fund about that.  
20 Why shouldn't it be up to 54 now?

21 MR. BUSHOFSKY: Your Honor, we don't know anything  
22 about this. This is just based on Ms. Lockner's kind of  
23 anecdote about what she and her colleagues apparently have  
24 found in their review of documents that ARA produced. And by  
25 the way, I think that Ms. Lockner and I don't think that she

1 misspoke said that they got all the documents related to AKF  
2 that they asked for and that they wanted. I think the purpose  
3 of her comment was to suggest that what is good for the goose  
4 is good for the gander and what my client's AKF's problem was  
5 also producing whatever documents she wants.

6 First of all, ARA produced whatever they produced.  
7 There was some level of document that they had to produce  
8 under the Court's order but of course, no one has ever gotten  
9 in trouble for producing too many documents to the other side  
10 and sometimes they do that. And Your Honor knows that and  
11 lots of times, rather than look through a bunch of documents  
12 to figure out what is truly tailored and specifically  
13 responsive to requests, you just give the other side all of  
14 the guys' e-mails. Because you don't want to look through  
15 them and you are not that concerned about what is in them.  
16 That doesn't have any bearing on the burden on my client.

17 THE COURT: Well, let me suggest this. I want to  
18 get us through this because we have a bunch of other issues.  
19 To the extent that United contends that there are additional  
20 patients of ARA that in some way are linked with the Fund in  
21 this umbrella of the complaint, I want the particular  
22 discovery or whatever it is that is the basis for United's  
23 belief just provide that to AKF and hopefully you are on the  
24 same play -- on the same page because it may be that there is  
25 no real dispute there.

1                   But right now as I understand it, AKF is sitting in  
2 the dark wondering who these particulars are and what is the  
3 basis for believing that they are part of it. It may be an  
4 issue of no dispute.

5                   MS. LOCKNER: And Your Honor, this is something that  
6 we factored into the subpoena. We again we couldn't identify  
7 the patients because of the protective order but we had said  
8 that once they signed the Exhibit A to the protective order,  
9 we would provide those identities. We have asked several  
10 times for them and to go to a different point now that the  
11 protective order, we did get leave from the Florida court to  
12 share things and to modify that order subject to the AKF  
13 signing Exhibit A and as well as having Your Honor enter a  
14 order that was as -- that has the same strength against it as  
15 the one in Florida.

16                  We have exchanged versions of that and I think we  
17 will be ready to get that to Your Honor on file later today  
18 hopefully. So if Your Honor -- once Your Honor signs that and  
19 then once the AKF signs the Exhibit A, we are good to go. So  
20 that won't be a problem.

21                  Your Honor, if I could turn to a couple somewhat  
22 related issues I think that maybe we will drive home the --  
23 the challenges that we are dealing with and maybe get your  
24 guidance on.

25                  THE COURT: Okay.

1                   MR. BUSHOFSKY: Ms. Lockner before you move on, can  
2 I address one issue that I think might -- it goes to a comment  
3 that the Court made that might resolve something here. I just  
4 wanted to make it clear that we have already offered you  
5 information about the specific patients at issue, once the  
6 information about those patients is revealed. And I wanted  
7 to -- that might sound like it is inconsistent with your  
8 recitation of my statement that ARA doesn't really care or  
9 keep track of what kind of policies people have.

10                  Let me be a little bit more clear for you and for  
11 the Court so that Your Honor understands exactly what I did  
12 mean and did say. This charity doesn't discriminate based on  
13 what kind of insurance people have. They also don't care  
14 about who their provider is. And so when a person who  
15 qualifies because they have a disability which is defined as  
16 End Stage Renal Disease, meaning that you have to have  
17 dialysis to live because of kidney failure and you meet  
18 certain financial eligibility requirements, meaning that you  
19 can't afford lots of things in your life including potentially  
20 insurance --- exchanging.

21                  Once those criteria are met and you have gone  
22 through the process of applying for a grant, you get a grant.  
23 Or whatever healthcare coverage you might need and I am just  
24 being specific to healthcare coverage now, the American Kidney  
25 Fund does lots and lots of other things for people who are

1 living with End Stage Renal Disease.

2                   But focusing on the insurance issues, the truth is  
3 and I don't think Ms. Lockner contends otherwise, the American  
4 Kidney Fund mostly helps people that are on Government plans.  
5 And one of the things that United Healthcare appears to be  
6 teaching now is information about how we help people even on  
7 Government plans. Because as it turns out, United has  
8 contracted the Government to provide services even related to  
9 Government plans. I won't get into the incredibly complicated  
10 details of those types of things but that is the case.

11                  And so the fact that -- the fact that we don't --  
12 that we don't discriminate doesn't mean that we are unable to  
13 tell someone in United's position who receives a grant that  
14 has an Obamacare plan versus some other kind of plan. So we  
15 actually can provide that information and we have offered to  
16 do that. I think that they want a lot more than that, which  
17 is the real problem.

18                  MS. LOCKNER: Your Honor, if I can --- I think I  
19 would like to --- to actually what my point was here, which is  
20 the grant --- two unrelated issues. One thing I did like from  
21 AKF is to know okay, each month how much money did you get  
22 from ARA? And how much money did in the aggregate and how  
23 much money did you get in aggregate to all --- because that is  
24 the only way that we can show that this is really a quid pro  
25 quo and using a path for the kick back team(sic) .

1                   And from my understanding, I do not believe it is a  
2 situation where ARA says oh here is our payment for ACA plans,  
3 here is our payment for employer group health care plan and  
4 here is our payment for this. It is a lump sum amount that  
5 cannot be parsed down and nor can -- and that way the  
6 aggregate number back also needs to be the aggregate number.  
7 That I don't think we can prove our case without having that  
8 higher level visibility. And again I think it is a simply  
9 request it is just the number each month going in and out from  
10 and to ARA.

11                  So that is quite simple. So I would be interested  
12 in your take on that Your Honor because I don't see how we  
13 prove out -- you know from a damages stand point, yes we are  
14 easily -- we are right now limited to the ACA plans. I don't  
15 dispute that and that is why we are not going to get into the  
16 we's(sic) on the individual cases. But from a standpoint of  
17 showing how this team operated, they can't do it -- we can't  
18 prove it by just getting individual information on a --- plan  
19 because that higher level showing how the team itself worked  
20 is not broken down that way.

21                  THE COURT: I will tell you that I am undecided on  
22 the approach there for the same thing that we talked about a  
23 little bit earlier. That is it makes sense to me what you are  
24 suggesting, however, in light of the limitations imposed by  
25 the Florida court, I don't know that the request isn't

1 pregnant with information regarding other monies that may flow  
2 between the two, whether it is Medigap or COBRA or something  
3 else. I don't understand how you can get into the particulars  
4 of those patients and their interactions or how their files  
5 are being handled without having that kind of particular  
6 information but I am not inclined to get in front of the  
7 Florida court in any way, shape or form.

8                   So if that is an issue of discovery, whether it is  
9 applying only to ARA or to other aspects of the case, you may  
10 end up having to get some guidance from them or you may have  
11 to just wait for me to struggle with whatever written  
12 submission may be necessary on either a motion to compel or  
13 the motion to quash.

14                  MS. LOCKNER: And Your Honor, if I could speak to  
15 that, we do have a document from ARA -- I guess we have  
16 received documents and discovery --- when it comes to amongst  
17 paying(sic) and other aspects of the case. So we do have a  
18 document at least going back I think to November 2015 that  
19 shows the aggregate amount of these payments that ARA made to  
20 the --. We would like to confirm that ARA has the same --  
21 the AKF has the same calculation, simple enough I would hope  
22 and then to see what the aggregate amount that was paid to ARA  
23 plans because it doesn't seem to be something that the ARA has  
24 in its -- at least in the documents that we have received.

25                  So I wouldn't say that you are getting out ahead of

1 the Florida courts, Your Honor, because to some degree we  
2 already have parts of that information from the ARA. We would  
3 just like to confirm that the AKF's numbers match and see what  
4 the return amount going to the ARA's patients again in the  
5 aggregate --

6 MR. BUSHOFSKY: Your Honor, may I?

7 THE COURT: Sure.

8 MR. BUSHOFSKY: Okay so this comes up a lot and I  
9 have been on both sides of this, I understand Ms. Lockner's  
10 position and she has a client, but what I have just heard is  
11 we have got the information that we want which is perhaps  
12 broader than what was required under the Florida judge's order  
13 and now we want confirmation from a third party. I mean, that  
14 is not an appropriate use of third parties discovery. It  
15 doesn't sound like it is controversial. It doesn't sound like  
16 Ms. Lockner thinks that the documents that she received was  
17 tampered with. Or that it was falsified.

18 And that they need a third party to look for the  
19 same document or the other side of the same communication.  
20 That is one point. I think it is -- I think it is emblematic  
21 of the problem of a bigger problem with the request. The  
22 suggestion that we are not telling you, Your Honor that ARA  
23 isn't complying with the discovery orders or holding anything  
24 back. There is no spoliation alleged but we need all of the  
25 same stuff from this third party just to be sure.

1                   That is one point -- please, the other point that I  
2 wanted to address quickly was the suggestion that we need to  
3 give Ms. Lockner's client, a big insurance company that has  
4 lots and lots of metrics that follow people around for the  
5 rest of their life and we represent sick poor people. So it  
6 is a big concern of mine. But the idea that they need all of  
7 the numbers and all of the information because AKF doesn't  
8 discriminate based on what type of insurance people want.  
9 That is not AKF's problem and it is probably not ARA's  
10 problem. Just a problem with the Fraud Theory.

11                  The Fraud Theory is that Obamacare opened up this  
12 loophole that allowed providers whether they are doctors or  
13 dialysis providers or doctors who take care of people with HIV  
14 and Aids, there was an opportunity for people who are really  
15 sick and poor, for some third party to come in whether they  
16 are completely charitable and on the up and up or they are a  
17 greedy doctor who wants people to have unnecessary surgeries.

18                  To have some third party come in and say hey I will  
19 pay for your premiums, you come over and get surgery and  
20 dialysis and then I will submit it to United instead of  
21 Medicare or Medicaid or something else because they make more  
22 money off of the contract that I negotiated with United versus  
23 the contract that the Government was able to impose on and  
24 negotiate with the healthcare provider.

25                  The fact that Ms. Lockner is not able to look at the

1 donations, not the payments but the donations until someone  
2 discovers otherwise or finds otherwise and IRS surely hasn't,  
3 or we would know about it and hear about it. The donations  
4 made by the healthcare providers pursuant to the OIG 1997  
5 guidance which said dialysis providers go on ahead, this is  
6 good for society, good for people dying of kidney disease,  
7 make whatever big donations you want to the American Kidney  
8 Fund and charities like it.

9                   The American Kidney Fund can't discriminate in your  
10 favor. They can't treat their people better than they treat  
11 other people who are dying of this disease. And there can't  
12 be any kind of obvious explicit quid pro quo because all of  
13 that is a kick back. So the 97 guidance is a safe harbor  
14 against anti-kick backs laws. And so what she is saying is,  
15 well gosh they don't discriminate and they don't keep track in  
16 complete compliance with the government guidance that provided  
17 a safe harbor so we need all of the information and we are  
18 going to dig into it and figure out where the quid pro quo  
19 actually is.

20                  MS. LOCKNER: Your Honor, this is exactly why I have  
21 a second point --

22                  THE COURT: Let me jump in --

23                  MS. LOCKNER: -- that I was wanting --

24                  THE COURT: -- let me jump in momentarily before we  
25 start. And I appreciate the continuing education here and I

1 am going to try to learn the language and get nomenclature  
2 better. I like the use of the words donation from ARA to the  
3 Fund. And throughout all of this, I will be continuing to  
4 struggle with how much information should United be entitled  
5 to pursue from the Fund in light of information that it  
6 already has obtained from ARA. And initially the first  
7 reaction would be that if you got it from one place, what  
8 gives you the right to go pursue it someplace else?

9                 The difference here as compared to many other  
10 instances in which we have Rule 45 in play, is that there is  
11 no -- the Fund is not being couched as just an innocent  
12 bystander who happens to have records. The Fund is being  
13 couched as a one that is complicit and part of this  
14 conspiracy. And so it is not quite the same as I may  
15 entertain in other cases in terms of trying to balance the  
16 burdens and the unreasonableness of any request.

17                 But in this instance, it sounds as though what  
18 United is seeking is really a monthly representation of  
19 donations coming in and monies going out through the ARA.  
20 That does not sound to me like it should be burdensome. It  
21 does not sound to me like it is something that is going to  
22 take real computer expertise to punch out numbers which really  
23 probably are going back a year or 18 months at best. So I am  
24 pretty much leaning towards United in this respect only in the  
25 sense that to the extent that the ARA has provided this

1 information -- they have a bench mark, it is not a fishing  
2 expedition and they are dealing with an opponent who they  
3 believe is evil incarnate. And they should in this instance  
4 be very cautious about accepting every representation that may  
5 flow from their adversary.

6 And to the extent that they pass muster, if they get  
7 passed the motion to dismiss, yes they got a real green light.  
8 But even here as I am sitting here for the Florida court to  
9 make that ruling, I am inclined to give them leeway to get  
10 that kind of information as long as it is not  
11 particularized in ways that I haven't heard.

12 MS. LOCKNER: And Your Honor, if I could add to  
13 that. One of the other pieces that we need and this is where  
14 we have not gotten any real visibility from ARA is not only to  
15 see an amount that ARA has been paid --- but we understand  
16 that the AKF made requests of ARA as well. And what we would  
17 like to know is did those requests match what ARA ended up  
18 paying. And part -- we would like to understand how is it  
19 that ARA or AKF came up with these amounts that are requested  
20 from ARA.

21 And again part of this I will be able to explain  
22 much more freely once we have a protective order in place and  
23 Mr. Bushofsky and his colleague have signed Exhibit A, but to  
24 suffice to say there is -- there are things that I will be  
25 able to show would suggest that AKF had unique information

1 about aggregate amounts that were requested and discussions  
2 that were had with ARA that we need visibility into. And  
3 again, aggregate levels -- not talking about individual and  
4 not talking about metrics on a individual case basis but how  
5 is it that they calculated and decided what they were going to  
6 request of ARA each month. Those are important things that  
7 we have been ---.

8 THE COURT: Okay --

9 MR. BUSHOFSKY: Your Honor --

10 THE COURT: -- let me just say that we are starting  
11 to get into some of the bewitching hour because we have been  
12 at this for an hour and I am making it another half an hour  
13 but I want to make sure that I can reach everything that I  
14 can. Let me go back to Mr. Bushofsky, you had something to  
15 say?

16 MR. BUSHOFSKY: Yes, thank you. So one of the great  
17 limiting factors in litigation of discovery is reciprocity,  
18 Your Honor. And you know, sometimes that gets out of whack  
19 when some individual named plaintiff in the class action  
20 brings a case against a big company -- the individual has no  
21 documents and the company has a lot of documents.

22 But in general, and I think it is the case in  
23 Florida where ARA has motion practice against United to compel  
24 them to produce documents and United has the motion practice  
25 against ARA, you know they are hashing them up themselves and

1       they are parties to a lawsuit.

2                   AKF isn't. And AKF doesn't have that reciprocity.

3       The way to give AKF that limiting power would be if this  
4       company, United Healthcare which continues in every  
5       opportunity to describe the donations that were permitted in  
6       the Federal Government in 1997 to describe them as payments  
7       and bribes and kick backs and things like that, with the  
8       charity as the hub of the conspiracy is to name AKF as a  
9       defendant.

10                  Of course, when they name AKF as a defendant, then  
11       AKF gets discovery against United Healthcare and indeed AKF  
12       might have to bring its counter claims on behalf of its  
13       beneficiaries under the Federal Rules against United  
14       Healthcare. Which I would do frankly, and I might relish it.  
15       But that is not happening right now and we are not a plaintiff  
16       or a defendant or a counter plaintiff in the case.

17                  And so if this is a one way street. The idea that  
18       we could provide just numbers on a monthly basis, here is how  
19       much we got from ARA donations, here is how much we have paid  
20       in charitable assistance to ARA's patients -- I am sorry, yes  
21       to ARA's patients over the course of a relative connected time  
22       period. It is probably information that we can get, it is  
23       probably information as Your Honor said that wouldn't be that  
24       burdensome to provide.

25                  Particularly if it is not broken down by policy type

1 or things like that. The problem with that is, and maybe we  
2 can get passed it, is that by definition we are going to be  
3 providing them all sorts of financial information, just  
4 numbers I understand but financial information that has  
5 nothing to do with the scheme alleged.

6 Because the great vast majority of money that my  
7 client -- a charity provides to sick poor people goes towards  
8 things that are not premium payments for United Healthcare  
9 plans on the Obamacare exchanges. And so it is not relevant  
10 to the claim. United is now going to have all of this  
11 information about relationships between charitable donors and  
12 charity. And money that ends up going to ARA's patients.  
13 That doesn't have anything to do either with United because I  
14 guarantee that most of the patients of ARA are not United  
15 policy holders because the vast majority of them actually have  
16 Medicare.

17 And so I am not sure how relevant that information  
18 could actually be and I think that is relevant to -- leading  
19 to a relevant is still the kind of low water mark to whether  
20 you can get to discovery. But it is easy enough relevance --  
21 you know maybe that is not an --- here, Your Honor. But the  
22 other stuff about what the charity was requesting -- first of  
23 all there is nothing wrong with charities reaching out and  
24 asking people for money to help.

25 But the suggestion is that we were calculating a

1 particular number, we held them up for it and they gave us  
2 exactly that number. We could look into that but I haven't  
3 heard anything specific about ATA(sic)plans, United plans --  
4 the people in Florida, the Florida Ohio plans -- the  
5 suggestion is that the charity asks big providers for money  
6 that are not specific to anything about United or even  
7 Obamacare but we are supposed to give all of our  
8 communications and information about our charitable requests  
9 of our donors to this giant healthcare company that keeps  
10 metrics on patients around the United States, it doesn't seem  
11 appropriate to me.

12 THE COURT: Well, it sounds like that is a policing  
13 issue and it is also a discovery problem that the two of you  
14 will gnaw at for some time. From the policing side of it, I  
15 guess some of that is going to be have to be dealt with in  
16 whatever protective order or confidentiality agreement that  
17 eventually is laid down.

18 But in terms of your production, we are caught  
19 between a rock and a hard place where on the one hand, I agree  
20 with you that they are not entitled to all of this information  
21 with respect to monies going in either direction for non-ACA  
22 folks. But on the other hand, you are telling me that you  
23 don't have the means to whittle it down to identify those that  
24 really would be relevant or really more helpful in this  
25 discussion.

1                   On a side note, with respect to -- a request for any  
2 communications for any contributions, whatever, I don't find  
3 that to be problematic and I do find it to be something to be  
4 protected on the back side, hopefully in a way that is more  
5 ironclad than not. But for now, I think I have spoken to  
6 those leanings.

7                   So I do think the ball is back in AKF's court in  
8 terms of something that you would like to talk about.

9                   MR. BUSHOFSKY: Your Honor, one thing that I think  
10 is a real fishing expedition, Ms. Lockner and her colleagues  
11 say that they don't know anything about the DOJ subpoena that  
12 my client received --

13                  THE COURT: Let me interrupt you. Let me interrupt  
14 you and let me go to Ms. Lockner -- I am trying to think -- I  
15 understand at some point you were asking for all  
16 communications with the DOJ and the AKF and if the AKF is  
17 correct in saying that you don't know even know specifically  
18 what was requested, why should they just hand over everything  
19 that was involved in what could be a very expensive event?

20                  MS. LOCKNER: Well, Your Honor there are actually a  
21 couple of -- all I can go off of is news article. And so  
22 there are articles that talk about DaVita, Fresenius and  
23 American Kidney Fund being subpoenaed relating to the HIPP  
24 program which is exactly at issue and AKF confirmed that they  
25 did receive a subpoena. DaVita stated that its subpoena

1 sought, "The production of information related to charitable  
2 premium assistance" so I can only assume that it is similar  
3 information. It just all seemed to come up out after the *New*  
4 *York Times* article -- Christmas article that really dealt  
5 exactly with the allegations that we have made in our  
6 complaint.

7 So in the situation where we ask the -- we requested  
8 the similar information from ARA, and what the Court did there  
9 was to the extent that there were -- and this is the best of  
10 my recollection, the extent that there were documents that  
11 were solely about other insurance companies or non-United  
12 related, those were excluded. But otherwise, the -- we got  
13 information about what they produced to the FCC -- I am sorry  
14 not the -- in that situation it was that FCC.

15 Similarly here we think it makes sense, I mean this  
16 is exactly the kind of scheme that we are talking about. It  
17 is relevant, it is not privileged. Because these are all  
18 things that they already decided. And if there is information  
19 that they think is solely related to non-United parties, then  
20 those can be excluded.

21 I think that the challenge that Mr. Bushofsky keeps  
22 talking about, to the extent that our complaint is related to  
23 ARA -- I am sorry, HDA(sic) -- that is -- that is going to be  
24 a damages issue. You know but we have to have a broader  
25 ability and we have had that ability with respect to ARA to

1 see how this scheme works in the aggregate and that is what  
2 we are asking for. So with respect to the scheme, it seems  
3 like they have already reviewed this information and it  
4 shouldn't be burdensome because they have already done it,  
5 they have already decided what is not privileged and  
6 privileged and if there is some finer nuances they want to  
7 explain to me, I am certainly willing to hear it but all I can  
8 go off is what I have read in the paper.

9 THE COURT: Well, and I tell you that my leanings  
10 are not to go with you on this one. Paper could be good,  
11 paper could be bad but here the while it is a similar  
12 investigation or maybe the identical investigation to  
13 basically tell them to pack up and ship over to you everything  
14 that they have had to respond by the DOJ being investigatory  
15 or regulatory efforts there, without your knowing specifically  
16 what is going on in terms of what is the request, seems to be  
17 yes a little overbroad.

18 So I am thinking that if in fact you get your hands  
19 on something that tells you particularly what they ask for and  
20 you know not to replicate that, that is a different story.  
21 But I am dealing here with again, as Mr. Bushofsky has taken  
22 pains to tell me, most opportunities is the non-party. Now I  
23 am not going to address the notion of whether you should or  
24 will be subpoenaing or serving a complaint upon AKF, either  
25 now or in the future or whether AKF even has the ability to

1 intervene to do all of this other counter discovery that it  
2 may want to do.

3                   But as it leans right now, they are a non-party and  
4 you are asking them for that information without knowing the  
5 particulars of the Government's request. So --

6                   MS. LOCKNER: And Your Honor, I certainly appreciate  
7 that. I mean, it is a challenge --- know most of these  
8 subpoenas are considered rather confidential, but if they are  
9 at least information relating to United or ARA that was  
10 produced in response to those subpoenas, that to me would be  
11 something that would be very relevant and should be  
12 responsible for our request.

13                  THE COURT: And wouldn't that have been something  
14 that you would be requesting anyway? Basically you are piggy  
15 backing on the Government. And I don't fault you for that,  
16 but here it is you are seeking discovery directly from them  
17 and basically you are using this to say -- and if I forgot  
18 anything or if you produce something somewhere else and it may  
19 be helpful to me, give me that too. And while that may not be  
20 as offensive if we had a true battle of two giants here in --  
21 in one litigation, this is the non-party if you will.

22                  And I don't necessarily accept the notion that AKF  
23 is the little sister of the poor but I also don't know that --  
24 I am not of the belief that you should get this kind of blank  
25 check for information you are not aware of. It really -- I

1 need you to be able to tell me with more particulars, look the  
2 Government subpoenaed this information in request number 4  
3 asked for this and we want that as well. That kind of thing.

4 But that is --

5 MS. LOCKNER: --- Your Honor, unless Mr. Bushofsky  
6 is going to offer to share the subpoena with me, I don't  
7 remember -- I am never going to have that -- I think part of  
8 what I was thinking was that this would be a -- you know, you  
9 point that I ask for this in other requests is certainly  
10 accurate. The question of whether they are ever going to  
11 agree to give us any of that remains to be seen. To me this  
12 seems like a possible way of finding -- you know this is a  
13 discrete category of documents that they have already gone  
14 through so in some ways it seems like a way to find compromise  
15 that of some of the other requests that we have made to  
16 minimize any burden on them. Because it already reviewed a  
17 lot of these.

18 So if they could do a search for ARA and United or  
19 some other search terms perhaps we could agree on of that  
20 category of documents, that might be a way around some other  
21 objections to other requests.

22 MR. BUSHOFSKY: Your Honor, if I may? I agree with  
23 you and I am sorry that I am not going to take yes for an  
24 answer from Your Honor, but I just want to address this on the  
25 record because we are on the record. I mean, United

1 Healthcare wants AKF to be gone. There is no question about  
2 and that is probably true for a couple of other insurance  
3 companies. I know you were being facetious a little bit Your  
4 Honor by saying that they are not the little sisters of the  
5 poor but it is a 501(c)(3) charity that has been in existence  
6 for 50 years.

7 It is run by terrific people who were public  
8 servants for years before they took a pay cut even from the  
9 Federal Government to run this charity. They have never been  
10 indicted, they have never been a defendant in a false ---  
11 case, not yet. They haven't -- Ms. Lockner might be chomping  
12 at the bit to do that, I guess. And so I think that you have  
13 to take them as you see them at this point and they are if  
14 nothing else like you said a third party and I hate to say it  
15 again but they are.

16 And so this is a little bit of a cage rattling here.  
17 There is no question about it in my mind. As much as I like  
18 Ms. Lockner, her client is pushing a lot of buttons for AKF.  
19 I think they would have liked for AKF to be on that side of  
20 this dispute and this involves over a short period of time  
21 with AKF being the hub of a conspiracy instead of a well  
22 meaning duke(sic). Which is how I think the insurance  
23 industries narrative describes AKF at first, before they  
24 declined to take a particular side in this little debate.

25 And so that is some context from my point of view.

1 To say that they just need everything that we are talking to  
2 the DOJ about is precisely what Your Honor said, I mean, it is  
3 belt and suspenders but it is not only that, it is a set up  
4 for a gotcha. So we have got Ms. Lockner saying that we need  
5 a double check on what ARA gave us, we got no reason to think  
6 that they holding anything back or they -- there is spoliation  
7 or a creation of false evidence but we would like the same  
8 stuff and we would like a charity -- a third party to go look  
9 for this stuff at their great expense just in case.

10 Well then this is another layer of that, give us  
11 what we are asking for and give us what you gave the DOJ,  
12 let's line those up and see if they pass -- is a ball on  
13 somebody somewhere and I don't think that that -- I feel like  
14 that is coming. And I don't think that that is an appropriate  
15 use of subpoena power, Your Honor.

16 THE COURT: Okay well I have thinned down on that  
17 one now and United, you get the next one.

18 MS. LOCKNER: Your Honor, let me see -- I am trying  
19 to figure out --

20 THE COURT: And it is okay for both of you to run  
21 out. That is fine.

22 MS. LOCKNER: No I am just trying to figure out the  
23 best way I know Your Honor doesn't have a lot of time here so  
24 I am trying to figure out where to get the most guidance from  
25 you and what would be the most useful. If we could talk a

1 little bit about figuring out perhaps communications with ARA  
2 and again I understand that we have tried to figure out a way  
3 to excise certain kinds of communications with ARA but then  
4 there is a whole having to do that would even be more  
5 burdensome. So I guess I wouldn't mind trying to explore -- I  
6 think we are entitled to -- for --- again I have done this  
7 before when I have been on the receiving end of a third party  
8 subpoena where it could be very easy to do searches for at  
9 American Renal dot com, to and from Kidney Fund dot com or dot  
10 org or whatever it is and just easily find all documents that  
11 were sent back and forth, you know there is no privilege.

12 And you know that is an easy way to do it without  
13 having to necessarily do a lot of reviews. Now they obviously  
14 don't want to produce everything and in fact, we wouldn't  
15 necessarily want everything but we would be getting more than  
16 we probably want because there is a lot of routine back and  
17 forth that we said that we wouldn't necessarily need.

18 But I would just be interested in getting  
19 Mr. Bushofsky's take and Your Honor's take on how we can glean  
20 some information about communications in a way that would be  
21 not too burdensome and yet just give United the information  
22 that it needs.

23 MR. BUSHOFSKY: To the extent that you were asking  
24 me, I am happy to address it but --

25 THE COURT: Go right ahead.

1                   MR. BUSHOFSKY: -- so I mean, I think this is a real  
2 fishing expedition request to basically telling everything you  
3 ever communicated to ARA about over the last four years. I  
4 mean, ARA is not the biggest dialysis provider and they are  
5 not the biggest charitable donor to the charity but I am sure  
6 that there is lots and lots of communication having nothing to  
7 do with what Ms. Lockner is interested in or entitled to.

8                   And Ms. Lockner knows -- but the Court here probably  
9 doesn't know yet, the Government long ago mandated that the  
10 dialysis providers actually have social workers on their  
11 payroll and installed in every one of these dialysis clinics  
12 for people living with End Stage Renal Disease have to attend  
13 multiple times a week for several hours a day to help  
14 people -- look if you have -- if you discover that you have  
15 kidney failure Your Honor, you might not be able to keep your  
16 job. You probably can't keep your job.

17                  Which as an aside is one of the most amazing things  
18 about the demand for information in these requests. For COBRA  
19 because what we are talking about is someone who had kidney  
20 failure, they lose their job, they want COBRA benefits and  
21 they can't afford it because they don't have the job and the  
22 American Kidney Fund helps them pay their COBRA copays or you  
23 know policy premiums and United Healthcare doesn't like it.

24                  But at the end of the day, the stuff that  
25 Ms. Lockner is asking for should be a very, very, very narrow

1 subset of communications which we both at the American Kidney  
2 Fund and both at ARA and to the point about the social work  
3 was simply that. There are social workers who are there  
4 because the Government doesn't have to be there who might be  
5 communicating on all sorts of different topics with employees  
6 and volunteers of the AKF.

7 Having nothing to do with this supposed --- scheme.  
8 And so if what Ms. Lockner really wants and thinks she should  
9 get are communication about you know, here is how much money  
10 we want from you and you know here is how much money we expect  
11 and I guess something coming back from the ARA saying okay,  
12 here is how much money we are going to donate this month or  
13 this year or this quarter whatever it is. That is a much  
14 different thing than tell us everything that you ever talked  
15 to ARA about.

16 And so you know, it would be difficult and time  
17 consuming and expensive for us to funnel down all of those  
18 communications to the ones that are relevant or potentially  
19 relevant. And the punch line -- the kicker is, ask ARA for  
20 this stuff. Why should my third party charity subpoena  
21 recipient be looking or anything and everything that has an  
22 ARA e-mail address when she has ARA over there as a party in  
23 the Florida case and can ask for and I think has asked for and  
24 she told the Court earlier that she got everything, that shows  
25 the communication.

1                 If it is a supposedly conspiracy and a fraud that  
2 involves communications and covert acts between the co-  
3 conspirators one of which they allege is my client, the  
4 unindicted co-conspirators as counsel has described it, then  
5 why not just get the information from the counter party that  
6 she has namely the defendant and if and when it looks like  
7 there is a gap spoliation, someone is lying, then maybe it is  
8 appropriate to come back and say, we are seeing a gap in ARA's  
9 production for this date, for that date or they didn't give us  
10 the stuff from the guy who we think was dealing with ARA, can  
11 you find it?

12                 That is a whole different scenario than give us  
13 everything between you and ARA for the last four years and if  
14 you don't want to look for the specific stuff, that is okay,  
15 we will dig through it.

16                 MS. LOCKNER: Well, and Your Honor, I think maybe  
17 this is where Mr. Bushofsky and I need to talk about whether  
18 search terms are -- I certainly don't want every single e-mail  
19 and --- some way to do it easily. Can I just --- a different  
20 topic Your Honor that addresses something that Mr. Bushofsky  
21 has mentioned several times already and I would like the  
22 Court's guidance on it?

23                 THE COURT: Go right ahead.

24                 MS. LOCKNER: That has to do with the Advisory  
25 Opinion 971. And AKF's compliance with it. Or you know

1 Mr. Bushofsky has mentioned that several times on this call.  
2 That advisory opinion was very much focused on -- first of all  
3 it didn't even apply to ARA, ARA wasn't a party to that  
4 advisory opinion. But it also focused on providing premium  
5 assistance for Medicare premiums. It had nothing to do and  
6 did not at all contemplate the idea of using these premium  
7 payments for commercial plans.

8 It was focused solely on Medicare. And I think  
9 maybe Medigap. But they have --- up publically many times on  
10 their website. Obviously on these calls. And so we would  
11 like to have information that documents relating to their  
12 compliance or non-compliance with that advisory opinion. And  
13 if they are perspective is that it does apply to the  
14 commercial client setting, you know we would like to  
15 understand any documents that they have or what their position  
16 from a testimony standpoint on that issue.

17 THE COURT: Before I go there, doesn't it sound to  
18 me like that is really a question of law in the sense of  
19 whatever they have done, by way of compliance or setting up  
20 protocols to comply -- it seems as though either they did  
21 something or they didn't and it is up to the lawyers and the  
22 Court to figure out whether it is in violation of that  
23 opinion, advisory opinion. I will hear you further  
24 Ms. Lockner.

25 MS. LOCKNER: Well, what we are trying to

1 understand, Your Honor, is if is their position that it  
2 applies to the situation alleged in the compliant here. Are  
3 they saying that the 971 opinion applies to commercial  
4 payments?

5 THE COURT: Maybe we can get an answer now. Go  
6 right ahead counsel, Mr. Bushofsky?

7 MR. BUSHOFSKY: Yes, sir. Well Your Honor, I think  
8 you are getting to the point. This is no legal question and  
9 what my client is going to be burdened to do here is search  
10 for response to documents and this is if we are forced to do  
11 what Ms. Lockner is asking, look for communications and  
12 internal and external presumably with lawyers about the import  
13 and coverage of the 971 opinion. And since none of it is  
14 going to be producible, because it is all going to be  
15 privileged, log it and then let's all argue in front of Judge  
16 Day for a long time about the privilege law again, what is on  
17 it.

18 This is a complete red herring and this is more cage  
19 rattling, Your Honor, in my view. The 97 guidance speaks for  
20 itself. The insurance companies have a different opinion  
21 about what it means than some other people. The Court in the  
22 Texas case that struck down CMS' rule making address the 97  
23 guidance a little bit and in favor of patients and providers  
24 frankly. And so you know, Ms. Lockner under 97 opinion is not  
25 necessarily something I think -- necessarily guides this

1 analysis, this dispute or you know what my client should have  
2 to produce.

3 I don't understand their theory necessarily to  
4 depend on the 97 guidance or compliance with it or non-  
5 compliance with it, so maybe I need some more understanding  
6 about why that is necessarily relevant. The 97 guidance  
7 didn't apply to patients on ACA plans or donations that ended  
8 up eventually in -- Court's money spongeable and as  
9 Ms. Lockner has said multiple times, they can't follow the  
10 money necessarily because my client never made those  
11 conditions because that would be inappropriate and  
12 inconsistent with its mission to treat everyone alike that has  
13 this disease.

14 But you know, I just don't understand how if 97 --  
15 if the 97 guidance supposedly isn't even applicable to the  
16 Obamacare exchanges, why it is even relevant and why we should  
17 be looking for it. I just -- and I am not going to take a  
18 position today on whether it is applicable and whether we were  
19 compliant. I don't see it as part of her case as I  
20 understand.

21 THE COURT: Well, did you hear that. That was a  
22 final lap bell. I mean, we have about 9 minutes until we are  
23 through whatever you want to work through but Ms. Lockner, you  
24 have the floor.

25 MS. LOCKNER: Your Honor, I think in my letter I

1 point out that they tell on their website, that the key to the  
2 program is the strict firewall that separates donations to AKF  
3 from determinations of case and eligibility for assistance.  
4 And they have also changed their representations about 971 and  
5 altered their HIPPP guidelines. So those are the things that  
6 we are interested in getting information.

7                   What is the -- the strict firewall? The HIPPP  
8 guidelines and the changes to that? We would like to see that  
9 all of the changes and the various iterations of the HIPPP  
10 guidelines through this time period. Because these have  
11 changed since our lawsuit was filed. So I am not asking for  
12 about a bunch of privilege communications and I would be  
13 willing to make accommodations in a privileged log for the  
14 sake of finding some compromise too.

15                   But there are I think a lot of non-privileged  
16 information about changes to their guidelines, changes to  
17 their policies and practices that are relevant and that I  
18 think we are entitled to.

19                   THE COURT: Well, let me cut it to the chase in this  
20 way, my leaning would be and I am glancing now at page 9 of  
21 Robin Kaplan's memo to me where we talk about the HIPPP program  
22 et cetera. My instinct was that seeking AKF's HIPPP honor  
23 system documents -- that is all documents I think would be far  
24 too broad. But you should be entitled to a fair share of  
25 donations information would seem to be more appropriate there.

1 It sounds as though if you are looking for the document that  
2 reflects what is there and any iterations over the years that  
3 may be fine but getting every slip of paper on the program  
4 doesn't I think move this thing along.

5 Let me also just skim a couple of my notes here to  
6 help you further because both of you will have the green light  
7 after this conference to file any motions that you may feel  
8 appropriate and after you wrestle with it further. Give me a  
9 moment.

10 (Pause)

11 THE COURT: Circling back a little bit and I am on  
12 page 6 of the same memorandum. There is a reference saying  
13 that AKF also claims that this discovery is fully obtainable  
14 from ARA and we are talking about producing documents -- maybe  
15 we covered that. Give me a moment. Going down to page 7 of  
16 the section dealing with United's prohibition of unauthorized  
17 third party payments. Talking about premiums and pre-paid  
18 cards and money orders et cetera and then later on you say  
19 that there are some documents that suggest that AKF was  
20 directly involved in routing money to ARA patients in a forum  
21 that was difficult for United to detect.

22 Is there something that I have not seen that gives  
23 you belief that this occurred? What are those documents? Can  
24 you give some guidance there?

25 MS. LOCKNER: And again Your Honor, once the

1 protective order on Exhibit A is signed, I can -- I will be  
2 happy to share those.

3 THE COURT: Fair enough.

4 MS. LOCKNER: There are certainly what we may  
5 have -- either there is indication -- once United made clear  
6 that it was not accepting payments from the AKF, it made the  
7 documents to show that ARA and AKF worked together to have  
8 checks from AKF send to ARA to the name of the patient and  
9 then the patient would deposit those and either use a money  
10 order or their own personal checks and we understand that  
11 there were some instances where they might have some sort of  
12 prepaid credit card use as well.

13 MR. BUSHOFSKY: Your Honor.

14 THE COURT: Go ahead.

15 MR. BUSHOFSKY: This is one of those instances where  
16 either through a lack of information or background in a  
17 particular issue or strategy someone is looking at something  
18 in broad daylight and saying that it is some kind of scheme or  
19 concealment or conspiracy. The --- client attached to it a  
20 complaint, the HIPP guidelines from my client that had stated  
21 for years and years that if an insurance company can't or  
22 won't for technical or other reasons or any reason, accept  
23 direct premium assistance from AKF or its needy patient, AKF  
24 will do what it can to serve those beneficiaries by just  
25 giving them the money directly.

1                   So what is happening now is and this is one of the  
2 basis of my case against insurance companies down in Louisiana  
3 in Federal Court in Baton Rouge where Aids and HIV charities  
4 were at issue. They want people off their rolls who are sick  
5 and poor if they can do it. And then makes it difficult if  
6 the folks are just taking money out of their own bank accounts  
7 or going down to the currency exchange and writing a check to  
8 United Healthcare.

9                   And so they want to take it a step further and start  
10 asking people, well where did your money come from that you  
11 paid your premiums with? And if they came from AKF, they have  
12 a problem with it. That might make it more difficult for them  
13 to figure out where the money came from. I think the health  
14 care insurers have all sorts of First Amendment problems and  
15 other privacy problems and discrimination problems if they  
16 demand to know where someone's cash is coming from that is  
17 paying for insurance premiums.

18                  But be that as it may, my client has always been  
19 transparent. So they are going to send their beneficiaries  
20 the grant that they are entitled to that they applied for and  
21 that they need to keep their life saving dialysis going. Even  
22 if the insurance company won't take it directly. What a  
23 scheme, what a conspiracy this is. It is not under the cover  
24 of night. It is out there open as day. And here is the punch  
25 line on this issue. These insurance companies gladly took

1       this money from AKF for years and years until the law changed  
2       such that they cannot charge more in premiums for people who  
3       have prior existing conditions.

4                 Now, they don't like it, they are pointing to some  
5       old language that is in their policies or they are adding  
6       language to policies that says for all sorts of reasons, we  
7       don't take money from third parties to pay for our customers'  
8       insurance. And if you try -- and they are having people sign  
9       documents to say that they didn't get it from you know -- I  
10      don't know if United has done that but some other insurance  
11      companies have done that. I don't know if that is appropriate  
12      or not, I am not going to take a position it.

13               But what I am telling you, Your Honor and we can  
14      give you the exhibit from Ms. Lockner's complaint that shows  
15      that this is out in the open and completely transparent and  
16      they don't need to put discovery into because it is not in  
17      dispute. They don't need to find out that we do it.

18               MS. LOCKNER: Your Honor, there is -- we have  
19      contracts that prohibit that kind of payment and ARA knows it  
20      and AKF knows it and they went ahead and tried to conspire  
21      together to evade that and breach that -- and have their own  
22      patients breach the contract with United. Now, if they are so  
23      transparent, then this really should be easy dispute, we  
24      should get whatever we have asked for in that regard and  
25      Mr. Bushofsky and or ARA and I can fight about what it means

1 later. But it doesn't sound like there is any concern there  
2 that they are more than willing to --

3 MR. BUSHOFSKY: Of course there is a concern.

4 THE COURT: Let me interrupt because I think I have  
5 just about timed out on what I can do for you today. I do  
6 have two other observations that I -- my leanings are against  
7 requiring any kind of disclosure about the top five anonymous  
8 donating providers identified in AKF's tax returns. And I do  
9 want to ask about this -- are you at liberty at this moment to  
10 say whether or not Mr. McDonough took the Fifth during his  
11 deposition on a repeated basis? Was that he a --

12 MS. LOCKNER: He did not plead the Fifth, Your  
13 Honor. And he does have some information that I would like to  
14 share that I think would helpful in sharing why we need more  
15 information from the AKF. But again I need the protective  
16 order signed by Mr. Bushofsky and sign Exhibit A, I am not  
17 able to read this much more than that.

18 THE COURT: I understood.

19 MR. BUSHOFSKY: We have signed Exhibit A.

20 THE COURT: Well, it looks like something is afoot  
21 and you all are making some progress so that we can have some  
22 more meaningful discussion on much of this. Let me ask you  
23 what -- there is a lot that is difficult in these telephone  
24 conference calls because of -- I have to end up stepping on  
25 conversations that I probably wouldn't have to do the same way

1 in person. Do you find this better for your respective  
2 clients? Or do you feel better with an in person  
3 presentations?

4 MR. BUSHOFSKY: Your Honor, even though it is a  
5 travel for me and Ms. Lockner, obviously, I think that an in  
6 person in camera meeting would be helpful.

7 MS. LOCKNER: I agree with that, Your Honor.

8 THE COURT: Okay, well in the future, should we have  
9 the need for these kind of discussion that we suspect would be  
10 more than an hour in duration, then speak up and I will be  
11 glad to deal with it in person. Because as we all know most  
12 of our communications is not verbal. So I must bow out now.  
13 But I will tell you that you have satisfied your procedural  
14 obligations with this Court to the extent that anyone wishes  
15 to file a motion, would it be helpful to the parties if I put  
16 a deadline on such?

17 MR. BUSHOFSKY: Your Honor, for the American Kidney  
18 Fund, it is Jeff Bushofsky, I would ask -- I would actually  
19 propose something that is maybe the opposite or the inverse of  
20 a deadline. A cooling off period I think maybe. Not that  
21 things got too heated or unprofessional today -- not at all.  
22 But what I would like to do for my client is study the  
23 transcript, pay closer attention to Your Honor's statements on  
24 the records, they give us some insight into your leanings.  
25 Look at what Ms. Lockner said, look at what I said frankly

1 because sometimes I forget as I am saying it.

2                   And meet with Ms. Lockner at least one more time to  
3 see if we can provide each other some proposals or counter  
4 proposals and maybe take care of this before the need for  
5 motion practice. I think we have time to do it now that the  
6 Florida litigation deadlines have been moved out and extended  
7 into the winter. And we also need to look at this McDonough  
8 stuff to see what could be relevant and lead us to maybe  
9 loosen our objections on a couple of things.

10                  I also wanted to talk to her about two issues that  
11 we didn't have before Your Honor today, at least not directly.  
12 One is who is going to pay for this if it does turn into a big  
13 expensive review and production if we can come to some  
14 accommodation and the wall that we would like to see in place,  
15 not just attorney's eyes only but making sure that the darn  
16 attorneys who are working for other insurance companies and  
17 lobbying for those insurance groups, that aren't actually  
18 involved with the ARA litigation down in Florida.

19                  THE COURT: Okay.

20                  MS. LOCKNER: Your Honor, I guess -- I think  
21 generally I think that kind of makes sense(sic) and I think it  
22 is important for us to have a chance to try to do some  
23 meeting and conferring after I am able to be a little more  
24 forthcoming with the information that I have. If you do have  
25 a minute, Your Honor, I wouldn't mind getting your take on

1       this idea that we should have some sort of wall as lawyers. I  
2       mean, we have a protective order. And Mr. Bushofsky is  
3       wanting to take -- he doesn't want to have a protective order  
4       applied to what AKF will be producing, he wants something  
5       different. I said that we can fight about that at a later  
6       time but the idea that my firm should somehow be limited and  
7       not be able to either represent other people or -- it is  
8       concerning to me obviously and there is no -- he put that in  
9       his letter and there is no case law to support it.

10           We obviously would -- even within this case, I can't  
11       share certain things with my client because they are attorneys  
12       eyes only. That -- we do that all the time. I take that  
13       directive very seriously which is why I stop --- to try to get  
14       this other protective order modified. So the idea that we  
15       would be sharing information with one client relating to  
16       another client, we simply don't do it. And the assumption not  
17       only is insulting but is not one that is a practical way for  
18       us to practice.

19           So I think that that request is -- we are going to  
20       find ourselves in front of Your Honor if we can't craft or get  
21       some guidance on that. If we have to, we do but I -- going  
22       back, I do agree with the idea that Mr. Bushofsky and I should  
23       take some time and meet and confer and then really kind of  
24       narrow the issues where we can find agreement and then the  
25       areas of disagreement remain to figure out a way to put that

1 in front of Your Honor.

2 THE COURT: Okay so dealing with the first thing  
3 first. It may be appropriate to set in a date for sort of a  
4 status conference to give the counsel -- something, a date to  
5 move toward because as a successful, you obvious do well with  
6 deadlines but more importantly to talk through if I can be  
7 helpful, any issues that are remaining and to just keep my  
8 finger on the pulse. And I am not trying to drive this case  
9 but I don't want it to drift too far away and then become  
10 unmanageable from my end.

11 As to the limitation -- attorney's eyes only and  
12 things like that, I am ordinarily very open to those kinds of  
13 agreements but I have been alerted by Mr. Bushofsky about some  
14 of the concerns that are spilling over from one litigation to  
15 the next to the next to the next. I am not prepared to of  
16 course making kind of ruling on anything like that but --  
17 there are certainly -- there are aspects of this case that can  
18 be considered confidential or for attorney's eyes only or for  
19 the litigation team only is probably a better way of saying  
20 it.

21 But I am sensitive to this concern. I am not ruling  
22 one or leaning one way very clearly. But it is intriguing to  
23 me whether this is a kind of a -- as AKF would describe it, a  
24 national conspiracy to get it or something far less than that.  
25 Maybe United would describe it as sort of an idea that

1 everybody is out to get them but it is fanciful.

2 So I don't know that I can give you any real clear  
3 guidance, Ms. Lockner at this time. But it is something that  
4 I am going to struggle with.

5 MS. LOCKNER: Understood, Your Honor.

6 THE COURT: Okay. Well, I appreciate your efforts  
7 and your submissions and your arguments of course. Any ideas  
8 about when we would like to have another just discussion about  
9 some things at this point? You think in a month? Two months?

10 MS. LOCKNER: I know that Mr. Bushofsky and I  
11 recently got back from vacation and I don't know if he is  
12 having any better luck than I am digging out but if we could  
13 meet sometime -- well first of all, Your Honor, if we could  
14 get you that protective order hopefully later today and if  
15 that could be signed, that would free us up to exchange some  
16 things sooner than later.

17 And then if we could try to meet sometime in the  
18 next week or maybe the latter part of next week or have a  
19 status conference the latter part of next week or perhaps  
20 right after the Labor Day weekend? Does that make sense?

21 THE COURT: Well, I don't know that you are going to  
22 have everything to review that you want to by then but how  
23 about this, whenever you want me to sign off on some documents  
24 that you got there, feel free to send an e-mail to my chambers  
25 so that we can catch it. Because right now I am down one

1 third of my staff for at least the balance of this week and  
2 trust me, this is a crazy week but I am thinking a conference  
3 call and status might be appropriate maybe about 30 days out  
4 unless you think that is too much time?

5 MS. LOCKNER: Yes, Your Honor, this is Ms. Lockner,  
6 I think that will be way too long. Although the scheduling  
7 order has been bumped out a little bit, we still have experts  
8 disclosures that are actually due before the end of discovery  
9 deadline. So we would like to keep things moving far more  
10 quickly and if we can't get something resolved in the next two  
11 weeks at the very latest, we would want to be having, I think  
12 motions going at that point so that we could at least have  
13 some hope of getting something by the end of September or  
14 October.

15 MR. BUSHOFSKY: Well, Your Honor, I thought that 30  
16 days out was reasonable and that is what I was going to  
17 suggest. We have an intervening holiday. We have to get the  
18 transcript from Your Honor and hopefully Ms. Lockner agrees  
19 with me that that would be helpful to review from today's  
20 discussion. I really think that that is a good starting point  
21 in addition to the letters. And maybe more so for a  
22 discussion between she and me. And I can't proportion to make  
23 your reporter to move any faster than he or she normally does.  
24 And wouldn't want to and I don't think a case with a late  
25 December cut off which may well move again, it is certainly

1 not going to get shorter is a reason to have a little bit of a  
2 fire drill.

3                   And I am in Delaware next week. Delaware --- for  
4 argument. So realistically I can probably get the transcript,  
5 think about these things, consult with my client. Have a sit  
6 down with Ms. Lockner, within the next three weeks making 30  
7 days out completely reasonable for a time to touch base with  
8 Your Honor.

9                   MS. LOCKNER: Your Honor, we served the subpoena  
10 almost three months ago now and like I said our expert  
11 disclosures are November either 1st or 3rd. And so we would  
12 need information definitely early October at the latest. And  
13 I think that time period is you are talking then end of  
14 September before we even start talking about motions and is  
15 not going to be helpful.

16                  THE COURT: Well, I can look at something as early  
17 as 7th or 8th of September. It is a pressure packed calendar.  
18 And if it is a status conference I would have to limit that  
19 discussion to no more than an hour and I have to find an hour  
20 to make that happen. Tell me about your 7th of Septembers?

21                  MS. LOCKNER: The afternoon is wide open for me,  
22 Your Honor. And the 8th works as well.

23                  THE COURT: I failed to mention my morning is  
24 consumed and my afternoon will be affected. But I can  
25 probably give you something maybe 3:00 or 4:00 on eastern

1 time?

2 MR. BUSHOFSKY: Your Honor, I want to be in Maryland  
3 for the status conference if that is what Your Honor is  
4 suggesting.

5 THE COURT: Oh I didn't think it that necessary, I  
6 thought we could do this by phone.

7 MR. BUSHOFSKY: Okay yes, but as it is, I have an  
8 all day hearing in another matter.

9 THE COURT: Okay and would that be true for the 8th  
10 as well?

11 MR. BUSHOFSKY: I am looking, Your Honor.

12 THE COURT: Okay.

13 MR. BUSHOFSKY: The 8th looks better but I have some  
14 serious concerns about our ability to get the transcript and  
15 Ms. Lockner and myself to sit down. I just -- I am having a  
16 hard time understanding what the real difference is going to  
17 be here between 3 weeks and 4 weeks but we can try it.

18 THE COURT: I am -- I am willing to try it, we can  
19 always move it if you think it would be not worth our time,  
20 all it takes is a joint memo from the two of you to my  
21 chambers saying we have talked and we don't think it is  
22 helpful at this hour to talk further with the Court. I  
23 certainly love getting some of my life back as opposed to  
24 always losing it. But if I heard you correctly, the afternoon  
25 of the 8th might work for you?

1 MS. LOCKNER: The whole day works for me, Your  
2 Honor, whatever works best for you.

3 MR. BUSHOFSKY: Your Honor, for AKF that day does  
4 work. I maintain the concern but we will get back to you in  
5 advance if like we haven't been able to get all the stuff that  
6 we need to have a meaningful discussion.

7 THE COURT: That is fine. I am going to put it down  
8 for September 8 at 3:00 p.m. eastern standard time and if  
9 there is anything that you all can send me, a page or two in  
10 advance of that, that is of interest, fine. It doesn't have  
11 to be jointly. Though in fact, why don't I do this, I will  
12 ask you to by noon on the 7th in the -- in your individual or  
13 your joint one or two page statement of where we are and where  
14 we need to go. And that will make our time hopefully more  
15 beneficial so I won't spend the entire time with trying to  
16 catch up.

17 But let's not plan on spending more than an hour  
18 together. Hopefully less and we will take it from there.

19 MS. LOCKNER: Okay thank you so much, Your Honor,  
20 for your time and all of your guidance.

21 MR. BUSHOFSKY: Thank you, Judge Day, I hope you had  
22 a good weekend in Chicago a couple of weeks ago.

23 THE COURT: I did. And I thank everyone who got the  
24 weather straight and the party right for me. It was good.  
25 But I will tell you that I am not very happy with your Palmer

1 House Hotel even as historic as it is. That place, it needs a  
2 remake -- a redo.

3 MR. BUSHOFSKY: We don't recommend it, Your Honor, I  
4 wish you had asked me. We could have gotten you a rate in a  
5 nicer hotel that is kind of in the neighborhood as well. Next  
6 time.

7 THE COURT: Oh okay. Well I thank you all for your  
8 time and attention and I did enjoy Hamilton by the way. So.

9 MR. BUSHOFSKY: That is good. You can't complain  
10 about Hamilton.

11 THE COURT: So until next time, you all have a great  
12 weekend.

13 MS. LOCKNER: Thank you, Your Honor.

14 MR. BUSHOFSKY: Thank you, Your Honor.

15 (Whereupon at 12:20 p.m., the telephone conference  
16 concluded.)

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25 Keynote: "----" indicates inaudible in transcript.

C E R T I F I C A T E

I certify that the foregoing is a correct transcript  
from the duplicated electronic sound recording of the  
proceedings in the above-entitled matter.

Lisa Contreras 8/28/2017  
Lisa Contreras Date  
Certified Transcriber  
Certificate No. CET\*\*D-474